

MEMO ENDORSED

MEMORANDUM ENDORSEMENT

Pena v. Downstate Correctional Facility Medical Department et al

No. 19 Civ. 07336 (NSR)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 1/21/2022

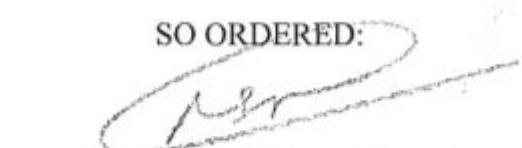
The Court has reviewed Plaintiff's Motion for enlargement of time dated November 27, 2021 (ECF No. 43) as well as Defendants' opposition dated December 20, 2021 (ECF No. 45). Plaintiff's request for leave to file a supplemental memorandum is denied. The parties fully briefed the motion to dismiss in April of 2021, and it will be decided in due course.

The Clerk of Court is kindly directed to terminate the motion at ECF No. 43, mail a copy of this endorsement to pro se plaintiff, and show service on the docket.

Dated: January 21, 2022

White Plains, NY

SO ORDERED:



NELSON S. ROMÁN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN PENA, :
Plaintiff, :
: :
: :
: :
: :
-against- :
: :
ROBERT MORTON JR., Superintendent of: :
Downstate Correctional Facility; :
OLAYEMI ODENIYI, Nurse Practitioner, :
Defendants. :
:

RECEIVED
SDNY PRO SE OFFICE

2021 DEC 13 AM 10:01

19-Civ.-07336 (NSR)
NOTICE OF MOTION FOR ENLARGEMENT OF
TIME PURSUANT TO Fed. R. Civ. Proc.
6(b) AND 56(e) TO FILE SUPPLEMENTAL
MEMORANDUM TO DEFENDANT'S MOTION TO
DISMISS THIRD AMENDED COMPLAINT

PLAINTIFF moves this court to enlarge for 30-days from 11/27/2021, the time to serve and file a supplemental memorandum in this cause, and in support of this motion, plaintiff submits an sworn affidavit attesting to his reasons to submit a supplemental memorandum to defendant's Motion to Dismiss Third Amended Complaint, alongside with circumstances constituting excusable neglect of time; and has also included the proposed supplemental memorandum herein for this court's consideration.

Dated: 11-27-2021
Ogdensburg, New York

BY:



Juan Pena DIN# 19A1222
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, New York 13669-0247
Plaintiff, pro-se.

cc: File
cc: Bruce J. Turkle, Esq.
Assistant Attorney General
28 Liberty Street
New York, New York 10005
(212)-416-8524
Attorney for Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
JUAN PENA, :
: :
Plaintiff, : :
: : No. 19 Civ. 07336 (NSR)
- against - :
: :
JANE DOE, M.D., et. al., :
: :
Defendants. :
----- X

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION TO FILE SUPPLEMENTAL PAPERS**

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants
28 Liberty Street, 18th Floor
New York, New York 10005
(212) 416-8524

Bruce J. Turkle
Assistant Attorney General
of Counsel

PRELIMINARY STATEMENT

Defendants Superintendent Robert Morton and Nurse Practitioner Olayemi Odeniyi (“N.P. Odeniyi”) (collectively, “Defendants”), respectfully submit this memorandum of law in opposition to the motion of Plaintiff *pro se* Juan Pena (“Plaintiff”), “pursuant to [FRCP] Rule 56 (e) and Rule 6(b) . . .” to submit supplemental papers to “properly support or address the facts in [D]efendants’ motion to dismiss.” Dkt. No. 44, ¶¶ 3, 5. Defendants’ dismissal motion has been pending for eight months. Plaintiff never sought an extension of time to oppose Defendants’ motion. He cannot now be permitted to submit additional papers, raise new arguments, and unduly delay this proceeding.

Assuming, *arguendo*, the Court grants Plaintiff leave to file the supplemental papers, Defendants request thirty (30) days in which to respond to the arguments raised therein.

ARGUMENT

PLAINTIFF’S MOTION FOR LEAVE TO FILE SUPPLEMENTAL PAPERS SHOULD BE DENIED

Plaintiff’s motion is effectively a motion for leave to file a sur-reply and should be denied in its entirety. Defendants’ dismissal motion was filed on March 3, 2021 (Dkt. No. 39) and received by Plaintiff on March 8, 2021. (Dkt. No. 44, ¶ 10). Plaintiff had twenty-six (26) days to file papers in opposition, which were filed on April 2, 2021, without Plaintiff seeking an extension of time to do so. (*Id.*, ¶ 10). Defendants served their reply papers on April 19, 2021. (Dkt. No. 42). Plaintiff then waited almost eight (8) months, until December 9, 2021, before seeking leave to further oppose Defendants’ motion. Plaintiff does not allege that that his supplemental papers address allegations raised for the first time in Defendants’ reply papers. *See DT v. Somers Cent. Sch. Dist.*, No. 06-Civ.-2674, 2009 WL 10706891, at *2 (S.D.N.Y. Feb. 11, 2009), *aff’d*, 348 F. App’x 697 (2d Cir. 2009) (“a court may grant leave to file a sur-reply where ‘the party making the

motion would be unable to contest matters presented to the court for the first time in the opposing party's reply.””) (*quoting Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)). He simply wants to file papers on his self-serving schedule to address arguments he contends were previously ignored. *See* Dkt. No. 44, ¶¶ 6.

Plaintiff erroneously contends that the nearly 8-month delay in seeking leave to supplement his opposition will not serve to prejudice the Court or Defendants or “further delay this civil proceeding.” Dkt. No. 44, ¶¶ 6. Consideration of Plaintiff’s belated submission would delay consideration of Defendants’ meritorious motion for several months and open the door for a countless number of *pro se* litigants to seek a second bite of the apple months after a motion has been fully briefed. Such a result would dramatically disrupt the orderly operation of the legal system.

In sum, Plaintiff is not the only incarcerated individual who must overcome obstacles such as limited access to the law library and unfamiliarity with the legal system. His *pro se* status does not excuse him from filing timely papers and seeking an appropriate extension. Plaintiff did not request more time to oppose Defendants’ motion and cannot surface months later with additional papers and additional arguments. His motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiff's motion for leave to file supplemental papers be denied in its entirety. Alternatively, should the Court grant Plaintiff leave to submit supplemental papers, Defendants respectfully request they be granted thirty (30) days in which to file responsive papers.

Dated: New York, New York
December 20, 2021

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants
By:

/s/ Bruce J. Turkle _____
BRUCE J. TURKLE
Assistant Attorney General
28 Liberty Street
New York, NY 10005
(212) 416-8524
Bruce.turkle@ag.ny.gov